89-1201

No. 89-_____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LESTER C. TOLLEFSON,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Montana Supreme Court

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Petitioner

QUESTION PRESENTED

The issue presented for review is whether Montana Code Annotated (M.C.A.) Section 61-8-401(4)(c), as highlighted below, is unconstitutional on the grounds that it conflicts with the Defendant's presumption of innocence and is violative of the Defendant's due process rights. The pertinent parts of this statute provide:

> 61-8-401. Persons under the influence of alcohol or drugs. (1) It is unlawful and punishable as provided in 61-8-714 and 61-8-723 for any person who is under the influence of:
> (a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public;
>
> * * *
>
> (3) "Under the influence" means that as a result of taking into the body alcohol . . . a person's ability to safely operate a motor vehicle has been diminished.
> (4) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle

while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:

* * *

(c) If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

I N D E X

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No. 89-_____

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OCTOBER TERM, 1989

LESTER C. TOLLEFSON,

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STATE OF MONTANA,

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PETITION FOR WRIT OF CERTIORARI

To the Montana Supreme Court

Petitioner, Lester C. Tollefson, prays a writ of certiorari issue to review the judgment of the Montana Supreme Court entered September 21, 1989, and Order Denying Request for Reconsideration entered

October 31, 1989.

OPINIONS BELOW

The Opinion and Order of the Montana Supreme Court (App.1) is reported at 780 P.2d 621 (Mont.1989) and the Order (denying reconsideration, App.2) is not reported.

The texts of the opinion of the Montana Supreme Court, overruling a Missoula County Justice Court decision, are both set forth in full in the appendix to this Petition.

JURISDICTION

The Order and Opinion of the Montana Supreme Court was filed September 21, 1989. Timely Motion for Reconsideration and Request for Oral Argument was filed, and was denied on October 31, 1989. This Court has jurisdiction under 28 U.S.C.A. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant Montana statutory provision is set out in pertinent part as follows:

> 61-8-401. Persons under the influence of alcohol or drugs. (1) It is unlawful and punishable as provided in 61-8-714 and 61-8-723 for any person who is under the influence of:
> (a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public;
>
> * * *
>
> (3) "Under the influence" means that as a result of taking into the body alcohol . . . a person's ability to safely operate a motor vehicle has been diminished.
> (4) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:
> * * *
>
> (c) If there was at that time an

alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

The issue is whether this statutory presumption (highlighted) conflicts with the Fourteenth Amendment of the U.S. Constitution. The Fourteenth Amendment states in pertinent part:

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In addition, the following provision of the Montana Rules of Evidence has application to the issue presented:

"Rule 301(b)(2), Mont.R.Evid., states that a disputable presumption 'may be overcome by a preponderance of evidence contrary to the presumption. **Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption'.**" (Emphasis supplied)

STATEMENT OF THE CASE

The Missoula County Justice Court set out the underlying facts and issues presented in its May 22, 1989, Order as follows:

"The Defendant in this case has been charged with DUI. After his arrest on April 18, 1989, the Defendant submitted to a blood test results of which showed a BAC level of 0.18, which evidence the State intends to introduce at the time of trial. This case was set to come to trial on May 11, 1989, but was continued upon the Court's receipt of the Plaintiff's unopposed Motion to continue based upon a scheduling conflict with an expert witness. The Defense has filed a Motion in Limine which asks the Court to declare a clause of the current DUI statute unconstitutional in that the offending clause violates the Defendant's presumption of innocence by

creating a mandatory rebuttable presumption to the contrary. The Defense further moves the Court to prohibit the State from introducing any evidence of the Defendant's blood alcohol level."

The Justice Court declared the statutory language unconstitutional on May 22, 1989 (App.3). Thereafter, the Justice Court denied the State's motion for reconsideration on July 13, 1989 (App.4). The State sought, and obtained, a writ of supervisory control in which the Montana Supreme Court issued its Opinion and Order dated September 21, 1989 (App.1). The Defendant's motion for reconsideration and request for oral argument was denied October 31, 1989, and this appeal followed.

The Defendant seeks review of the Montana Supreme Court's ruling, and reinstatement of the Justice Court's order declaring the

offending statute unconstitutional.

REASONS FOR GRANTING THE WRIT

I. MCA 61-8-401(4)(c) IS UNCONSTITUTIONAL.

To sustain the charge of driving under the influence of alcohol, the State of Montana must prove that the Defendant:

1. Was driving a motor vehicle,

2. upon the ways of this state open to the public,

3. within Missoula County, Montana

4. while under the influence of alcohol.

"Under the influence" means that as a result of alcohol a person's ability to safely operate a motor vehicle has been diminished.

See M.C.A. Section 61-8-401.

Since the first three elements of this crime are easily proven, and generally undisputable, the fourth element "while

under the influence of alcohol" is the linchpin of the State's case. Proving "under the influence" requires proof that a person's ability to safely operate a motor vehicle has been diminished. But, Section 61-8-401(4)(c) resolves that issue for the State as well.

M.C.A. Section 61-8-401(4)(c) provides that if the accused's blood alcohol concentration is 0.10 or more, "it shall be presumed that the person was under the influence of alcohol. Such a presumption is rebuttable." M.C.A. Section 61-8-401(4)(c) is unconstitutional for several reasons.

A. SECTION 61-8-401(4)(c) VIOLATES THE DEFENDANT'S PRESUMPTION OF INNOCENCE.

Essentially, once it has been established that the Defendant's blood alcohol concentration is 0.10 or more,

Section 61-8-401(4)(c) permits the Court to assume that the Defendant was under the influence of alcohol without any further evidence. This permits the Court to prejudge a conclusion which the Court should reach of its own volition.

> "A presumption which would permit the Court to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." (Emphasis in original) Sandstrom v. State of Montana, 442 U.S. 510, 522, 99 S.Ct. 2450, 2458, (1979).

Section 61-8-401(4)(c) is thus unconstitutional because it violates the Defendant's presumption of innocence.

Similarly, this same issue was addressed in City of Missoula v. Shea, 202 Mont. 286, 661 P.2d 410 (1983). In Shea, supra, the Montana Supreme Court stated:

> "Rule 301(b)(2), Mont.R.Evid., states that a disputable presumption 'may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.' Thus, the trier of fact is not free to accept or reject the presumption. The effect of the presumption is to violate constitutional due process requirements by shifting the burden of persuasion to defendant and contradicting the presumption of innocence. We therefore come to the conclusion that the prima facie presumption is unconstitutional and invalid."

Id. at 414.

The Missoula County Justice Court found the cited statute unconstitutional. In a careful, detailed analysis contained in a seventeen page opinion, the Justice Court traced the history of both U.S. and State Supreme Court cases relevant to the issue presented. The Justice Court carefully considered each of the State's arguments, and those additional statements raised in the State's Motion for Reconsideration, and rejected them.

The Justice Court began with a correct identification of the challenged language, and discussed the effect of such presumptions:

> "Moreover, MRE 301 provides with respect to presumptions:
>
> > (a) Presumption defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the proceeding.

and also,

(1) Conclusive presumptions are presumptions specifically declared conclusive by statute.
(2) All presumptions, other than conclusive presumptions are disputable and may be controverted.

A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

The Defense argues that the presumption is, albeit rebuttable, nonetheless mandatory and serves to relieve the state of its obligatory burden of persuasion in a criminal case to prove <u>every element</u> of the charge beyond reasonable doubt. The element at issue under the DUI presumption is that of 'being under the influence', a fact which the jury is directed by statute to presume <u>if</u> it finds that the Defendant had, at the

> time he was in actual physical control of a motor vehicle, a BAC level of 0.10 or greater. Such a presumption with respect to the ultimate issue or to an element thereof is precisely what is precluded by the due process clause of the 14th Amendment, a preclusion which has been sanctioned in Sandstrom et al, supra."

The Justice Court then traced the evolution of cases addressing the question of presumptions in criminal cases, including Sandstrom v. State of Montana, 442 U.S. 510, 99 S.Ct. 2450, (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, (1985); City of Missoula v. Shea, 202 Mont. 286, 661 P.2d 410 (1983), and most recently, Rolle v. State of Florida, 528 So.2d 1208 (Fla.App.4Dist. 1988).

The Justice Court recognized the precedent set by Sandstrom and Shea,

"In Shea, the Montana Court, referencing Winship and Sandstrom acknowledged that '[d]ecisions of the United States Supreme Court on due process questions are binding on us.' (Shea p. 313)."

The Justice Court has correctly found the presumption mandatory and rejected the State's argument that it merely created a "permissive inference":

> "A review of the language in MCA 61-8-401(4) reveals that the presumption is mandated by law. That statute provides that in the appropriate proceeding (DUI cases), the Defendant's BAC level, as shown by chemical analysis ". . . shall give rise to the following presumptions: . . .
>
> > (c) if there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable."

The language of 'shall' is

clear and unambiguous. The jury is directed by law, upon a finding that the Defendant had a BAC of 0.10 or more, to presume that the Defendant was under the influence.

Consider now the definition of what it is that the fact finder is obligated to do, -i.e., make a presumption. We saw that the definition of presumption under Montana law, quoted above (MRE 301) is '. . . an assumption of fact that the law requires to be made from another fact or group of facts . . .' (emphasis added). Furthermore, in the case of disputable presumptions - the sort under consideration here, even though these may be overcome by a preponderance of evidence contrary to the presumption, nevertheless '[u]nless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.'

We should explicitly notice here that the due process requirements hold with respect to every element of the offense as charged by the State (See Sandstrom, Supra p. 510).

The condition of 'being under the influence' is one element which the state must prove if it is to prove its case in a DUI charge.

With this in mind then it is clear from the above that in DUI cases in which the State has proven beyond a reasonable doubt that the Defendant had at the time he was in control of a motor vehicle a BAC level of 0.10 or more, that the fact finder is obligated as a matter of law to presume that the Defendant was, at the time, under the influence. It is also clear that since, by definition, the fact finder must find that the Defendant was under the influence unless the presumption is overcome, then just as the Court ruled in Shea, here too '. . . the trier of fact is not free to accept or reject the presumption,' and where this is the case, there is a violation of '. . . constitutional due process requirement by shifting the burden of persuasion to the Defendant' and thereby (1) '. . . contradicting the presumption of innocence,' and thus (2) rendering the presumption '. . . unconstitutional and

invalid.' (Shea p. 414).'

Rolle, supra, represents the most recent pronouncement by any other appellate level court on the question presented here, and in that case, the Florida appellate court struck down language nearly identical to that raised here based upon its reading of Sandstrom and Franklin.

B. SECTION 61-8-401 (4)(c) CREATES AN UNCONSTITUTIONAL MANDATORY PRESUMPTION.

The State must prove every element of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the Defendant. Sandstrom, 442 U.S. at 524, 99 S.Ct. at 2459. But, Section 61-8-401(4)(c) provides that it shall be presumed that the person was under the influence of alcohol if the BAC was 0.10 or more. Thus Section 61-8-401(4)(c) is an

unconstitutional mandatory rebuttable presumption because it relieves "the state of its burden of proof of the essential element of impairment by instructing the Court not that it has a choice to determine whether the Defendant was impaired based upon the results of a mechanical test, but that it must accept as proven the essential fact of impairment if the test result shows a blood alcohol reading of 0.10% or more." Rolle v. State of Florida, 528 So.2d 1208 (Fla.App.4Dist. 1988).

As the U.S. Supreme Court noted in Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, (1985), "A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed

element by instructing the Court that it must find the presumed element unless the Defendant persuades the Court not to make such a finding . . . such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." 471 U.S. at 317, 105 S.Ct. 1972-73. See also, Sandstrom v. State of Montana, 442 U.S. 510, 523-524, 99 S.Ct. 2450, 2459 (1979); County Court of Ulster County v. Allen, 442 U.S. 140, 157, 99 S.Ct. 2213, 2225 (1979).

Thus M.C.A. Section 61-8-401(4)(c) creates an unconstitutional mandatory rebuttable presumption.

C. "THE PRESUMPTION IS REBUTTABLE" IS MISLEADING.

The State has argued that Section 61-8-401(4)(c) provides that "Such presumption is rebuttable." However,

> "The very statement that the presumption 'may be rebutted' could have indicated to a reasonable juror that the Defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the presumption. Standing alone, the challenged language undeniably created an unconstitutional burden-shifting presumption with respect to the [presumption]." Francis v. Franklin, 471 U.S. 318, 105 S.Ct. 1973.

Further, Montana Rule of Evidence 301(b)(2) provides that a presumption "may be overcome by a preponderance of evidence contrary to the presumption." Such a requirement shifts not only the burden of production, but also the ultimate burden of persuasion on the issue of driving under the influence. See also Sandstrom v. State of

Montana, 442 U.S. at 518, 99 S.Ct. at 2456.

In its opinion and order dated September 21, 1989, the Montana Supreme Court states that the language merely creates a "permissive inference." A careful reading of the statutory language, especially when considered in the context of the rules of evidence, makes the terminology mandatory and not permissive.

Clearly, the language "the presumption may be rebutted" does not remedy the constitutional defect in M.C.A. Section 61-8-401(4)(c).

II. THE ISSUE RAISES A SUBSTANTIAL QUESTION OF CONSTITUTIONAL PROPORTIONS, NATIONWIDE IN SCOPE.

The issue raised here is based upon statutory language found throughout the traffic codes of the fifty states.

Thousands of individuals are prosecuted each year in all fifty states, under statutory provisions similar or identical to that challenged here. Under the circumstances, there exists a substantial constitutional question that has national significance and such issue should be reviewed by this Court.

CONCLUSION

M.C.A. Section 61-8-401(4)(c), (1) violates the Defendant's presumption of innocence, and (2) creates an impermissible mandatory rebuttable presumption, and thus should be declared unconstitutional by this Court.

Respectfully submitted this 26th day of December, 1989.

LARRIVEE LAW OFFICES

Noel K. Larrivee

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23nd day of January, 1990, a true and correct copy of the foregoing Petition for Writ of Certiorari, as modified, was mailed, postage pre-paid to the Respondent's counsel at the following address:

Robert L. Deschamps III
Missoula County Attorney
Missoula County Courthouse
Missoula, MT 59802

Marc Racicot
Montana Attorney General
3rd Floor, Justice Building
215 North Sanders
Helena, MT 59620

Noel K. Larrivee

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LESTER C. TOLLEFSON,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

APPENDIX TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

APPENDIX 1

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 89-417

STATE OF MONTANA,

Plaintiff and Petitioner,

v.

LESTER C. TOLLEFSON,

Defendant and Respondent.

) ORDER
) AND
) OPINION

This matter is before the Court on the application of the State of Montana for a writ of supervisory control. The State seeks review of an order of the Justice Court, Missoula County. That court, in ruling upon defendant's motion in limine, found unconstitutional Section 61-8-401(4)(c), MCA, on the presumptive effect of blood alcohol content in a DUI case. Lester C. Tollefson has filed a response to the State's application for supervisory control.

Supervisory control is sometimes justified where there is no remedy by appeal or other remedial procedure to provide relief and where extraordinary circumstances are present. Rule 17, M.R.App.P.; State v. District Court (Mont. 1981), 632 P.2d 318, 322, 38 St.Rep. 1204, 1208. The parties to this case agree that this Court should take supervisory control.

A disturbing aspect in this case is that there is no record because the case comes to us from Justice Court. Adequate review of a question of constitutional magnitude is difficult at best under these circumstances. We therefore question whether a justice court can be a proper forum for consideration of the constitutionality of a statute. However, because the State may not appeal the ruling of the Justice Court and because of the statewide significance of

the issue involved, the Court concludes that supervisory control is justified.

Section 61-8-401(4)(c), MCA, provides:

> (4) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by a chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:
>
> . . .
>
> (c) If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

The Justice Court found that the statutory language "it shall be presumed that the person was under the influence of alcohol" relieved the State from being required to prove every element of a criminal case beyond a reasonable doubt. Relying on Sandstrom v. State of Montana (1979), 442

U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39, and other cases, the court then declared Section 61-8-401(4)(c), MCA, unconstitutional.

When interpretations of a statute may vary, courts will choose a constitutional interpretation over an unconstitutional one. Department of State Lands v. Pettibone (1985), 216 Mont. 361, 374, 702 P.2d 948, 956. In construing statutes nearly identical to the challenged statute, several state courts have found those statutes to be constitutional. Barnes v. People (Colo. 1987), 735 P.2d 869; State v. Dacey (Vt. 1980), 418 A.2d 856; State v. Coates (Wash.App. 1977), 563 P.2d 208, Commonwealth v. DiFrancesco (Pa. 1974), 329 A.2d 204. The above state courts have interpreted the language used in their statutes to create a permissive inference, not a mandatory presumption.

For purposes of this case, we interpret Section 61-8-401(4)(c), MCA, to create a permissive inference that the person was under the influence of alcohol. We reverse the Justice Court's declaration of unconstitutionality and we direct the court to deny defendant's motion in limine to exclude evidence of blood alcohol content. Because our ruling is for purposes of this case only, this issue may be raised in the event defendant is convicted and obtains a trial de novo in district court.

DATED this 21st day of September, 1989.

/s/ J.A. Turnage

/s/ John Conway Harrison

/s/ John C. Sheehy

/s/ Fred J. Weber

/s/ William E. Hunt, Sr.

/s/ R.C. McDonough

/s/ Diane G. Barz

APPENDIX 2

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 89-417

STATE OF MONTANA,

Plaintiff and Petitioner,

v.) O R D E R

LESTER C. TOLLEFSON,

Defendant and Respondent.

The motion for reconsideration and request for oral argument is denied.

DATED this 31st day of October, 1989.

/s/ J.A. Turnage

/s/ John Conway Harrison

/s/ John C. Sheehy

/s/ Fred J. Weber

/s/ William E. Hunt, Sr.

/s/ R.C. McDonough

/s/ Diane G. Barz

APPENDIX 3

IN THE JUSTICE COURT, MISSOULA COUNTY, MONTANA
BEFORE DAVID K. CLARK, JUSTICE OF THE PEACE

STATE OF MONTANA
Plaintiff

-vs- ORDER

LESTER C. TOLLEFSON
Defendant

CASE NO: CO57585

BACKGROUND

The Defendant in this case has been charged with DUI. After his arrest on April 18, 1989, the Defendant submitted to a blood test results of which showed a BAC level of 0.18 which evidence the State intends to introduce at the time of trial. This case was set to come to trial on May 11, 1989, but was continued upon the Court's receipt of the Plaintiff's unopposed Motion to continue based upon a scheduling conflict with an expert

witness. The Defense has filed a Motion in Limine which asks the Court to declare a clause of the current DUI statute unconstitutional in that the offending clause violates the Defendant's presumption of innocence by creating a mandatory rebuttable presumption to the contrary. The Defense further moves the Court to prohibit the State from introducing any evidence of the Defendant's blood alcohol level.

The State opposes the Defense on both issues. The State declares that the DUI statute <u>is</u> constitutionally sound, and that, even if it is not, it is improper to exclude evidence about the Defendant's BAC level. The State therefore asks the Court to deny the Defendant's Motion in Limine in its entirety.

The position of both parties have been set forth in their respective briefs and, more recently on May 8, 1989, in oral argument presented in open court.

DISCUSSION

The Defense contends that U.S. Supreme Court decisions, most notably Sandstrom v State of Montana, 442 US 510-524, (1979) and thereafter Francis v Franklin, 471 US 307-327, (1985), and finally, a Montana Supreme Court decision also following Sandstrom, viz., City of Missoula v Shea, 661 P2d, 410 (1983), and most recently, Rolle v State of Florida, 13 F.L.W., (4th District Florida, Apr. 27, 1988, #87-2089), collectively expose the present Montana DUI statute 61-8-401(4)(c) to be in conflict with the constitutional safeguard of due process as guaranteed by

the 14th Amendment. Clause (4) of this statute provides, in relevant part

> Upon the trial of any civil or criminal action or proceeding arising out of acts to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by the chemical analysis of the person's blood, urine, breath or other bodily substance, shall give rise to the following presumptions;...
>
> (4)(c)
>
> If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

Moreover, MRE 301 provides with respect to presumptions

> (a) Presumption defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the proceeding.

and also,

> (1) Conclusive presumptions are presumptions specifically declared conclusive by statute.
>
> (2) All presumptions, other than conclusive presumptions are disputable and may be controverted.

> A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

The Defense argues that the presumption is, albeit rebuttable, nonetheless mandatory and serves to relieve the state of its obligatory burden of persuasion in a criminal case to prove <u>every element</u> of the charge beyond reasonable doubt. The element at issue under the DUI presumption is that of "being under the influence", a fact which the jury is directed by statute to presume <u>if</u> it finds that the Defendant had, at the time he was in actual physical control of a motor vehicle, a BAC level of 0.10 or greater. Such a presumption with respect to the ultimate issue or to an element thereof is precisely what is precluded by the due process clause of the

14th Amendment, a preclusion which has been sanctioned in Sandstrom et al, Supra.

The Defense goes on to maintain that once the State is unable to rely upon a constitutionally unsound presumption, then evidence about BAC levels is at once rendered irrelevant. For if the jury cannot receive the instruction which requires them to infer the presumed fact from the supportive fact, and thus cannot receive lawful instruction which informs them of the significance of the BAC level, they will have no basis upon which to evaluate this information. Without this basis, the Defense believes evidence about BAC levels to be either more confusing and/or prejudicial than probative.

In response to the Defendant's arguments, the State asks the Court to consider an arsenal of cases which establish that the presumption contained within the DUI statute is constitutionally sound, the most significant of which seem to be County Court of Ulster County v Allen, 442 US 140, (1979), and State of Vermont v Dacey, VT. 418 A2d, 856, (1980). From these and similar cases cited in the State's brief, the State's arguments come into focus as follows:

1) Where there is a strong rational connection between facts, here, "...between the basic fact and the fact to be presumed, a presumption does not invade the fact finder's task of reviewing the evidence...[and hence]...there is no breach of a Defendant's constitutional rights." ((State's brief, p.3), see also

Ulster County Supra, pp. 157-59). The State goes on to maintain that their "rational connection" is well-established and well-documented.

2) These cases reveal that the presumption contained within 61-8-401 MCA is not mandatory, but is permissive. The State again relies upon Ulster County, contending that given the appropriate "rational connection" between the underlying and the presumed facts, the presumption may be construed as permissive, and if permissive, no shifting of the burden of persuasion occurs.

The State also draws support from Dacey, Supra, which is a DUI case involving a statutory presumption similar to that in 61-8-401 MCA. In this case the Vermont

Supreme Court found that the presumption was (a) permissive and not mandatory, and (b) that such a presumption would not invade the province of the fact finder and (c) not shift the burden of proof.

3) The State also maintains that any determination of whether a statutory presumption creates a constitutional conflict must be decided on a case by case basis. That is, if the nature of the presumption at issue as viewed by the finder of fact, depends upon the instructions of law which are actually read and submitted to the jury, the Court must not decide in advance whether such institutions are constitutionally infirm. Moreover, the trial court has the power to fashion the instructions in such a way that it can attempt to meet the

constitutional safeguards. Then, whether it successfully does so is a matter for an appellate court to decide.

4) Finally, the State argues that the Rolle case is to be distinguished from those cases relied upon by the Defense since the language in Rolle speaks, not of a presumption, but of a prima facie case. This difference then, is believed to constitute a significant differentiation and is not to be relied upon as a basis to make a similar ruling about presumption.

ANALYSIS

I

Sandstrom was a deliberate homicide case, where Sandstrom was charged with "purposely or knowingly" causing the victim's death. The Defendant maintained

that while he had killed the victim, he did not do so purposely or knowingly. The jury was instructed that "(t)he law presumes that a person intends the ordinary consequences of his voluntary acts." The Defense objected that this instruction had the effect of shifting the burden of proof with respect to an element of the alleged offense, viz., the mental state. Upon appeal, the Montana Supreme Court held that while "shifting the burden of proof to the Defendant by means of a presumption is prohibited, allocation of "some burden of proof" to a Defendant is permissible. "The Court held further since the Defendant was obligated only to provide some evidence that he lacked the requisite intent, the instruction did not violate due process standards. However, the U.S. Supreme Court reversed, and held

that the instruction was unconstitutional.

In Sandstrom, the US Court held that "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. "Presumptions are either mandatory or permissive, and if mandatory, either conclusive or rebuttable. While the US Court here was careful not to usurp the authority of the Montana Court in interpreting Montana law, and thus did not rule that the jury instruction created a mandatory as opposed to a permissible presumption, it nevertheless emphatically pointed out that an interpretation of the instruction as being mandatory and even conclusive was not unreasonable under Montana law. It may have been viewed as

conclusive since the jury was not instructed otherwise. Yet even if understood as a rebuttable presumption, the Court pointed out that Montana law does state that "Unless the [disputable] presumption is overcome, the trier of fact must find the presumed fact in accordance with the presumption". MRE Rule 3(6)(2). (Sandstrom, p. 518, Supra.)

Considerations akin to the above led the US Court to conclude that a reasonable man - "here, apparently the drafter of Montana's own Rules of Evidence - could interpret the presumption at issue in this case as shifting the burden of proving his innocence by a preponderance of the evidence." (Sandstrom, p. 518, notes, Supra.). The Court reasoned further that

"...the question before this court is whether the challenged jury instruction had the effect of relieving the State of its burden of proof enumerated in Winship (infra) on the critical question of the petitioner's state of mind." (Emphasis added).

In In re Winship, 397 US 358 (1970), the US Court articulated the appropriate mode of constitutional analysis for presumptions.

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (Sandstrom p. 520.)

In Sandstrom, then, the Court followed Winship and went on to hold

> Because the jury may have interpreted the challenged presumption as conclusive... or as shifting the

> burden of persuasion... and because either interpretation would have violated the Fourteenth Amendment requirement that the State prove every element of a criminal offense beyond a reasonable doubt, the instruction is unconstitutional. (P.510)(Emphasis added)

and again,

> A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to petitioner, would have suffered from similar infirmities. (P.511)

and again,

> Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden shifting presumption...or a conclusive presumption...and because either interpretation would have deprived the Defendant of his right to the due process law, we hold the instruction given in this case as unconstitutional. (Sandstrom p.524)(Emphasis added)

It is clear from the above that the US Supreme Court then has taken the position that whatever the nature of the presumption, mandatory or otherwise, if such a presumption either shifts the

burden of proof or can be reasonably interpreted as an instruction to shift the burden, the presumption is unconstitutional.

In Francis v Franklin, Supra, the U.S. Supreme Court reaffirmed its decision in Sandstrom in a similar case. Upon a discussion of the various types of presumptions the Court stated

> A mandatory rebuttable presumption ... relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the Defendant's perspective, but it is no less unconstitutional. (Franklin p. 317).

In City of Missoula v Shea, the Montana Supreme Court was faced with the task of, among other things, the prima facie presumption in the City's parking

ordinance, Sec. 20-184, which read

> Presumption in Reference to Illegal Parking. (a) In any prosecution charging a violation of any law or regulation governing the standing or the parking of a vehicle, proof that the particular vehicle described on the complaint was parked in violation of any such law or regulation, together with proof that the defendant named in the complaint was at the time of such parking the registered owner of the vehicle, shall constitute in evidence a prima facie presumption that the registered owner of such vehicle was the person who parked or placed such vehicle where, for the time during which, such violation occurred. (Shea, p.412)

In Shea, the Montana Court, referencing Winship and Sandstrom acknowledged that "[d]ecisions of the United States Supreme Court on due process questions are binding on us." (Shea, p.313) The Court then went on to hold that the parking ordinance created a disputable presumption which, under Montana law requires that if the presumption is not overcome, then

"...the trier of fact is not free to accept or reject the presumption" (MRE 301(6)(2)). Thus,

> ... the trier of fact is not free to accept or reject the presumption. The effect of the presumption is to violate the constitutional due process requirement by shifting the burden of persuasion to defendant and contradicting the presumption of innocence. (Shea p.414)

Finally,

> We therefore come to the conclusion that the prima facie presumption is unconstitutional and invalid. (Shea p.414)

II

Following Sandstrom's standard of threshold inquiry for constitutional analysis applicable to this case, this Court must first determine the nature of the presumption at issue.

A review of the language in MCA 61-8-401(4) reveals that the presumption

is mandated by law. That statute provides that in the appropriate proceeding (DUI cases), the Defendant's BAC level, as shown by chemical analysis

> ... shall give rise to the following presumptions:..... (c) if there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

The language of 'shall' is clear and unambiguous. The jury is directed by law, upon a finding that the Defendant had a BAC of 0.10 or more, to presume that the Defendant was under the influence.

Consider now the definition of what it is that the fact finder is obligated to do, - i.e., make a presumption. We saw that the definition of presumption under Montana law, quoted above (MRE 301) is "...an assumption of fact that the law requires

to be made from another factor group of facts..." (emphasis added). Furthermore, in the case of disputable presumptions - the sort under consideration here, even though these may be overcome by a preponderance of evidence contrary to the presumption, nevertheless "[U]nless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption."

We should explicitly notice here that the due process requirements hold with respect to every element of the offense as charged by the State (See Sandstrom, Supra p.510). The condition of "being under the influence" is one element which the state must prove if it is to prove its case in a DUI charge.

With this in mind then it is clear from the above that in DUI cases in which the State has proven beyond a reasonable doubt that the Defendant had at the time he was in control of a motor vehicle a BAC level of 0.10 or more, that the fact finder is obligated as a matter of law to presume that the Defendant was, at the time, under the influence. It is also clear that since, by definition, the fact finder must find that the Defendant was under the influence unless the presumption is overcome, then Just as the Court ruled in Shea, here too "...the trier of fact is not free to accept or reject the presumption.", and where this is the case, there is a violation of "... constitutional due process requirement by shifting the burden of persuasion to the Defendant" and thereby

(1)"...contradicting the presumption of innocence," and thus (2) rendering the presumption "...unconstitutional and invalid.". (Shea, p.414)

III

We may now review the challenges presented by the State. The State maintains first that the presence of a strong rational connection between the operative and presumed facts will correct any constitutional difficulties. It relies mainly upon Ulster County.

In Ulster County, the U.S. Supreme Court rejected the earlier ruling of the US Court of Appeals which found that the presumption at issue was both mandatory and unconstitutional. The Court ruled that the presumption was permissive and not mandatory, and, that since it was

permissive, the "rational connection" between the underlying and presumed facts need only to be that the latter is ''more likely than not to flow from the former." (Ulster County, Supra., p. 165.). That Court also concluded that where the presumption is mandatory, the State "...may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." (Ulster County p. 167)

This latter finding is construed by the State to suggest that where the reasonable doubt standard is met, mandatory presumptions are not unconstitutional. There is no need to attempt to determine whether such was the intent of the US Supreme Court in the Ulster case. Here,

it is crucial to notice that Ulster predates Sandstrom. In Sandstrom and subsequent cases cited above, the US Court has made clear that whatever the constitutional requirement is for the rational connection between the predicate and the presumed facts, this requirement is merely a necessary condition for constitutionality, and is never a sufficient condition. The key considerations beyond "rational connection" are that (1) the State must not be relieved of its burden of persuasion on the element in question beyond a reasonable doubt (see Franklin, p. 308) and (2) the fact finder must not be required to make the inference to the presumed fact, i.e., the presumption must not shift the burden of proof (see Sandstrom, p. 510.). This standard is

both recognized and adopted by the Montana Supreme Court in Shea, p.413 & 414.).

Thus, it is of little consequence in itself that the "rational connection" between "having a BAC greater than or equal to 0.10 " and "being under the influence" may be well-established. If constitutional integrity is to be achieved, the State must also show that the Montana DUI presumption does not shift the burden of proof and thereby relieve the State of its burden of persuasion and deprive the Defendant of the constitutionally entitled presumption of innocence.

Here, the State again relies upon Ulster, but in Ulster, the Supreme Court overturned the US Appellate Court because

it found that the trial court adequately instructed the jury that the presumption (from being a passenger apprehended in a car with handgun hidden inside to being in possession of those handguns) could be made only upon making certain other findings, and that in any case, there is a controlling "...mandatory presumption of innocence in favor of the Defendants ...unless [the jury] ... is satisfied beyond a reasonable doubt that the Defendants possessed the handguns...") (Ulster County, p. 162).

Since the jury was not required to infer the presumed fact, the US Court ruled that the presumption was indeed permissive. This situation
does not hold under Montana Evidentiary and DUI law.

The State also draws upon Dacey, which is a Vermont DUI case. There, the Vermont Supreme Court ruled that the presumption created within their DUI statute, which is very similar to that of Montana, was a permissive and not a mandatory presumption. The trial court's instruction to the jury which stated, among other things, that the presumption "...is not a presumption of guilt. The Defendant retains presumption of innocence throughout the trial..." but also stated that the State "...has the benefit of the presumption... that the Defendant was under the influence of intoxicating liquor...[and]...If you do not believe the testimony of the Defendant, introduced to rebut this presumption, the presumption stands." The Vermont Supreme Court correctly held that this instruction was

confusing and misleading and may have had the effect of shifting the burden proof with respect to an element of the case. Thus, the case was reversed and remanded.

Of course, the findings of sister states are not binding on Montana courts; their value consists in the opportunity to explore the rationale behind their rulings. In this case, such exploration is limited since, although the DUI statutes contain highly similar language about presumptions, this court has no information about the definition of presumption under Vermont law. However, if that definition is virtually the same as that of Montana law, it is the position of this Court that the Vermont court erred in its finding that the presumption is merely permissive. If the definition

differs substantially, then the Vermont case is not relevant to the Montana case.

Finally, it is clear that the Vermont court held that any jury instruction which may leave the impression with the Jury that they must find the presumed fact to hold unless it is rebutted was unconstitutional. As seen earlier, this situation is precisely that which is required under the Montana definition of presumption. Therefore, it appears that the Vermont case does not support the State's contention that the Montana DUI presumption is permissive and fails to shift the burden of proof.

The State also argues that any unconstitutional difficulty with the Montana

statutes can be corrected by a jury instruction which makes it clear that the presumption is in fact permissive. This intriguing prospect is not one for which this Court can find any support.

It is not the duty or responsibility or even within the province of the Court to rewrite the law. The responsibility of the Court is to interpret and apply the general law to particular cases. Here, the Court can instruct the jury only with respect to what the law in fact says, not with respect to what it would say if it were paraphrased in a way that made its application constitutional.

In this case, the Court can consider only the statutory law, and the common law handed down by Montana and U.S. Supreme

Courts. The Montana DUI and Evidentiary laws create a mandatory presumption which require the fact finder to infer the presumed fact from the operative fact. The presumed fact is an element of every DUI case. Both the U.S. and Montana Supreme Courts have ruled that presumption of this nature are unconstitutional. Any jury instruction which would correct this is either itself unlawful (since the court would have to perform a legislative act to create such an instruction) or, is in direct conflict with existing Montana law and could only confuse the jury if coupled as an instruction with the current law. Neither of these alternatives is acceptable.

Finally, the State maintained that the Montana DUI cases should be distinguished

from the Rolle case since the latter involved the creation of a prima facie case. This argument must fail. A prima facie case has been established, by definition, when the Plaintiff has shifted the burden of proof. A presumption, if mandatory and rebuttable shifts the burden of proof by requiring that the presumed fact be found to be the case unless rebutted. The two terms thus constitute a distinction without a difference.

If 61-8-401(4c) is unconstitutional, should the State then be allowed to introduce evidence of the Defendant's BAC level in the absence of an instruction which explains the particular relevance of this evidence? MRE 401 provides that

> Relevant evidence means any evidence that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Yet, even though relevant, MRE 403 allows that if

> ...the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury ...

the evidence may be excluded. Otherwise, "All relevant evidence is admissible." (MRE 402).

In the case before the Court, this Court believes that evidence of the Defendant's BAC level is clearly relevant but has not been provided with grounds to lead it to believe that the probative value of the introduction of evidence pertaining to BAC levels is substantially outweighed by the considerations of MRE 403.

CONCLUSION

Given the definition of presumption under the MRE and the ruling of the US Supreme Court in Sandstrom et al, and of the

Montana Supreme Court in Shea, this Court finds that MCA 61-8-401(4)(c) is constitutionally infirm in that it creates a mandatory presumption with respect to an element of the charge that the fact finder is not free to reject, and which, even though rebuttable, violates the Defendant's presumption of innocence. This presumption is constitutionally invalid.

Furthermore, the Court finds that, the introduction of evidence regarding the Defendant's blood alcohol level is, not withstanding the above, more probative than prejudicial and, excepting a showing to the contrary, holds such evidence to be admissible.

From the aforementioned, this Court now gives the following:

ORDER

1) The Defendant's Motion to declare 61-8-401(4c) MCA unconstitutional is granted and the State will not be entitled to rely upon the statutory presumption at trial.

2) The Defendant's Motion to exclude evidence relating to the Defendant's blood alcohol level is denied.

So ordered.

5-22-89
ENTERED

/S/ David K. Clark
JUSTICE OF THE PEACE
DEPARTMENT #1

APPENDIX 4

IN THE JUSTICE COURT, MISSOULA COUNTY, MONTANA
BEFORE DAVID K. CLARK, JUSTICE OF THE PEACE

STATE OF MONTANA
Plaintiff

-vs- ORDER

LESTER C. TOLLEFSON
Defendant

RE: State's Motion to Reconsider

DISCUSSION

On June 23rd, 1989, the State filed a Motion for Reconsideration of this Court's May 22, 1989 ruling that 61-8-401(4c) MCA, is unconstitutional. Thereafter, both parties have completed and submitted written argument regarding the Motion.

It is the State's contention that the section of law in dispute is indeed constitutional. The argument runs that if

constitutional interpretations of a statute are favored over those interpretations which are not constitutional, and, there is an interpretation of clause (4c) of the existing Montana DUI law which is constitutional, the Court should give to that law the constitutional interpretation. Since it is the case that under Montana law a constitutional interpretation of a statute is favored over one that is not, (Department of State Lands v. Pettibone, 702 p2d 948 (1985); T&W Chevrolet v. Darvial 641 P2d i368 (1982);) and since there is an interpretation of 61-8-401 (4c) which is constitutional, the Court is obligated to render its interpretation of the statute accordingly. Ultimately, the Court is then to instruct the Jury in keeping with the constitutional interpretation.

The State also maintains that State v. Kramp, 651 P2d, 614 (1982), provides authorization for the "...substitution of proper jury instructions to protect a defendant's rights." (State's Brief on Motion for Reconsideration, p.4). Based upon Kramp, the State asserts that the following instructions be submitted to jury as "...proper statement of law." (States Brief, p.4).

> You are instructed that if the Defendant has an alcohol concentration in his blood, breath or urine of 0.10 or more, you are permitted, but not required to infer that he was under the influence of alcohol. It is your exclusive province to determine whether the facts and circumstances shown by the evidence warrant the inference to be drawn by you. You must weigh the evidence presented and decide whether the State has proven beyond a reasonable doubt that the Defendant was under the influence of alcohol.

The Defense opposes the State's Motion on the grounds that these considerations

introduce little that is new and do not rebut the Court's position taken on May 22, 1989 in presenting in its decision. Furthermore, the Defense holds that consideration of specific jury instructions prior to trial and as a condition for determination of a constitutional issue is improper and premature.

The State's Motion here is premised on the contention that where there exist opposing interpretations of a statute, one constitutional and the other not, the Court is to favor the constitutional interpretation. It is the finding of this Court that this premise is true but irrelevant since there is no legitimate constitutional interpretation of 61-8-401 (4c) MCA.

The cases cited by the State show that the competing interpretation must derive from an ambiguity in the interpreted body of law. In T&W, the ambiguity concerned whether the Consumer Protection Act was sufficiently specific in meaning to meet due process requirements. T&W, pps. 1370-1). In Pettibone, the dissention centered upon whether 77-6-115 MCA applied to water rights or only to improvements (Pettibone, p. 956).

No such ambiguity exists here. The statutory language is both clear and emphatic, and the State has benefited from its clear meaning on each occasion in the past on which the statute has been presented to the jury as an instruction. The language of "...shall presume..." (61-8-401 4c), and of "...requires to be made from another fact... & "must find the assumed fact in

accordance with the presumption." (MRE 301) leave no doubt but that a reasonable person would understand the presumption as mandatory.

The State draws support for the alternative interpretation from Barnes v. People, 735 p2d, 869 (Colo. 1987) where the Colorado Court held that "...even where statutory language appears to create a mandatory presumption in criminal cases, courts commonly read the statute as creating only a permissive inference. "Barnes, p.872.

But this contention, although endorsed in Colorado, is simply false. Many courts do not read such statutes as creating only permissive inferences. The Florida Courts did not do so in Rolle v. State of Florida, the US Supreme Court did not do so in

Sandstrom or in Franklin, and the Montana Supreme Court did not do so either in Shea, or even in the case cited by the State in its Motion for Reconsideration, State v. Kramp.

In fact, the Montana Court is to be applauded for not taking the tactic of the Colorado Court, and the precedent for not doing so has been established in earlier cases. The standard is set forth in T&W. The Court held with respect to the prime facie presumption of constitutionality that "...every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt" (T&W p. 1370) .

In cases involving the mandatory presumption, the Montana Supreme Court has found that there exists no reasonable doubt

that these presumptions are unconstitutional. In so finding, it has avoided both the invitation to legislate (by effectively rewriting the statute as per the Colorado Court) and the absurd conclusion that no statute is really unconstitutional since it can be rewritten as one which is not unconstitutional.

The second issue raised by the State in its Motion for Reconsideration is that Kramp provides the trial court with authorization to substitute "...proper jury instructions to protect a Defendant's rights."

In Kramp, the Defendant was charged with theft under 45-6-304 MCA and testimony was introduced that the Defendant was in possession of stolen property. Among the instructions presented to the jury was an

instruction that stated that although stolen property did not constitute proof of guilt, it nevertheless "...shall place a burden on the possessor to remove the effect of such fact..."(p.619).

The Montana Supreme Court held that this instruction was a due process violation (Kramp, p.614) and unconstitutionally shifted the burden of proof to the Defendant. Yet, it also held that since (1) the jury ought to be allowed to consider the unexplained possession of stolen property and infer from that fact the Defendant's involvement in the theft, and since (2) this consideration is important because it is the only direct evidence in the case which points to the Defendant's guilt, then the jury should be instructed as to the effect it may give such consideration. (Kramp

p.621).

The Supreme Court does not offer further explanation of its rationale, but it is important to venture a reconstruction of such explanation before addressing the State's argument.

The Court has surely authorized the reading of a permissive inference jury instruction in cases like Kramp. But what are the distinguishing factors of Kramp? A consideration of 26-1-501 & 502 MCA furnishes definitive insight into the conditions under which an inference may be made.

An "inference" is a deduction which the trier of fact may make from the evidence provided it is founded

(1) on a fact legally proved; and

(2) on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

In Kramp, the State did prove that the Defendant was in the unlawful possession of stolen property. The Supreme Court thus seems to be tacitly holding that from this legally proven fact, the inference of the Defendant's guilt is founded upon a deduction "...warranted by a consideration of the usual propensities or passions of men,...". That is; given that the unexplained illegal possession was direct evidence of the Defendant's guilt and the inference to that effect was one which reasonable people might typically draw, the Supreme Court supported the instruction upon retrial. This rationale is both compelling

and consistent with statutory requirements.

Tollefson however does not satisfy the above conditions of the Kramp instruction. First, evidence of the Defendant's BAC level is not direct evidence; information about a person's BAC level is instead circumstantial evidence of being under the influence.

More importantly, it is not evidence which, in itself, forms the basis from which reasonable people would typically draw conclusions about whether a person having particular BAC level is under the influence of alcohol.

In order to bring the jury to the point from which they would be likely to draw such conclusion, the State would need to introduce (presumably expert) testimony

which, after withstanding the scrutiny of cross examination, would purport to establish the strong likelihood that persons with a certain BAC level are indeed also under the influence of alcohol. Not only is it precisely this task which the State wishes to avoid by means of the instruction, such a maneuver does not invoke the "usual propensity" clause of 26-1-502 since it has required special testimony to convince the jurors of the importance of the BAC level. So either Kramp does not apply here, or the State (if the expert testimony is convincing) does not need the instruction.

This Court believes that such disputes are clearly factual in nature and in the absence of legislation to the contrary, should be battled out in the courtroom through the adversarial system. Here it is crucial that

the trial court does not assert itself as either a legislative body or as an expert witness for either party.

The Court assumes just such a function if, e.g., in a non-jury trial it concludes that a Defendant who has a .125 BAC level is, by virtue of that fact, under the influence of alcohol, when it has not heard any compelling testimony about the meaning and effect of BAC levels. To draw such a conclusion, the Court either has tacitly issued a legislative directive to itself which sanctions that type of inference, or has instead become an expert witness for the State. The Court must not do the former since it is not a legislative body. It must not do the latter since doing so would constitute a due process violation by depriving the Defendant of his right to

cross examine the State's most crucial witness (the Court) with regard to its "expertise".

The same rationale applies to considerations as to when to instruct the jury. Any instruction that informs the jury they may single out one particular fact as more significant than another sends the unmistakable message that (1) the Court so views that fact, (2) the supposition is somehow anchored in the law. The result is that the Court has effectively become both witness and legislator.

It is also worth noting that every set of stock jury instructions includes a statement or series of statements much like the following:

> You are the sole judges of the credibility of all the witnesses testifying in this case, and of the weight to be given their testimony. (Montana Criminal Jury Instruction, Instruction No. 1-003)

The weight of the evidence is to be decided on the strength of empirical data presented. The Court must not direct the jury on the one hand that they should decide what is important, and on the other select the BAC level as an item of singular importance from which they may draw an inference.

Thus, if the Court is to avoid action as legislator, and as expert witness for the State, and if the permissive inference instruction cannot be justified under the guidelines of Kramp, the instruction should

not be given.

In general however, the particular form and content of jury instructions must be decided at the time of trial. No final determination of these instructions can be made until the Court has reviewed the testimony and evidence submitted by each party.

Nonetheless, and for the reasons herein stated, the State's Motion to Reconsider is hereby denied.

So ordered.

7-13-89
ENTERED

/s/ David K. Clark
JUSTICE OF THE PEACE
DEPARTMENT #1

Supreme Court, U.S.
FILED
APR 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1201

In The

Supreme Court of the United States

October Term, 1989

LESTER C. TOLLEFSON,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari
To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether this Court has certiorari jurisdiction to review an interlocutory order of the Montana Supreme Court reversing a pretrial decision of a court of limited jurisdiction which found Mont. Code Ann. § 61-8-401(4)(c) (1989) unconstitutional.

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No. 89-1201

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

On March 26, 1989, the petitioner, Lester C. Tollefson, was charged in the Justices' Court for Missoula County, Montana, with driving under the influence of alcohol, a violation of Mont. Code Ann. § 61-8-401 (1989).[1] In

[1] That statute provides in relevant part:

(1) It is unlawful and punishable as provided in 61-8-714 and 61-8-723 for any person who is under the influence of:

(a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public[.]

Montana, justices' courts are courts of limited jurisdiction[2] and are not courts of record.[3] Driving under the

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[2] Mont. Code Ann. § 3-10-303 (1989) sets out the limited criminal jurisdiction of justices' courts and provides in relevant part:

> The justices' courts have jurisdiction of public offenses committed within the respective counties in which such courts are established as follows:
>
> (1) jurisdiction of all misdemeanors punishable by a fine not exceeding $500 or imprisonment not exceeding 6 months or both such fine and imprisonment;
>
> . . . .
>
> (3) concurrent jurisdiction with district courts of all misdemeanors punishable by a fine exceeding $500 or imprisonment exceeding 6 months or both such fine and imprisonment[.]

[3] Mont. Code Ann. § 3-1-101 (1989) provides:

> The following are courts of justice of this state:
>
> (1) the court of impeachment, which is the senate;
>
> (2) the supreme court;
>
> (3) the district courts;
>
> (4) the municipal courts;
>
> (5) the justices' courts;
>
> (6) the city courts and such other courts of limited jurisdiction as the legislature may establish in any incorporated city or town.

Mont. Code Ann. § 3-1-102 (1989) provides:

> The court of impeachment, the supreme court, the district courts, and the municipal courts are courts of record.

influence of alcohol is classified as a misdemeanor offense,[4] which is within the limited criminal jurisdiction of Montana's justices' courts.

---

[4] Mont. Code Ann. § 61-8-714 (1989) provides in relevant part:

(1) A person convicted of a violation of 61-8-401 shall be punished by imprisonment in the county jail for not less than 24 consecutive hours or more than 60 days and shall be punished by a fine or not less than $100 or more than $500. The jail sentence may not be suspended unless the judge finds that the imposition of the jail sentence will pose a risk to the defendant's physical or mental well-being.

(2) On a second conviction, he shall be punished by a fine of not less than $300 or more than $500 and by imprisonment for not less than 7 days, at least 48 hours of which must be served consecutively, or more than 6 months. Three days of the jail sentence may not be suspended unless the judge finds that the imposition of the jail sentence will pose a risk to the defendant's physical or mental well-being.

(3) On the third or subsequent conviction, he shall be punished by imprisonment for a term of not less than 30 days, at least 48 hours of which must be served consecutively, or more than 1 year, and by a fine of not less than $500 or more than $1,000. Notwithstanding any provision to the contrary providing for suspension of execution of a sentence imposed under subsection, the imposition or execution of the first 10 days of the jail sentence imposed for a third or subsequent offense that occurred within 5 years of the first offense may not be deferred or suspended.

A misdemeanor offense is defined by Mont. Code Ann. § 45-2-101 (1989), which provides in relevant part:

(36) "Misdemeanor" means an offense in which the sentence imposed upon conviction is imprisonment in the county jail for any term or a fine, or both, or the sentence imposed is imprisonment in the state prison for any term of 1 year or less.

Prior to trial of this charge in the Justices' Court for Missoula County, petitioner filed a motion in limine seeking to have the court declare Mont. Code Ann. § 61-8-401(4)(c) (1989)[5] unconstitutional and to suppress the results of a blood alcohol concentration breath test administered to petitioner shortly after his March 26, 1989, arrest for the offense at issue here. (Resp. App. 1 and 2.)

The Justices' Court for Missoula County found the challenged section of Montana Law unconstitutional but denied petitioner's motion to suppress the results of the breath test. (Pet. App. 3.) Thereafter, the State filed a motion to reconsider with the Justices' Court, arguing that because the statutory provision at issue involved an element of the underlying criminal offense about which the jury would ordinarily be instructed, any alleged constitutional infirmity in the challenged statute could best be corrected by instructing the jury in language which would not conflict with existing constitutional precedent. (Resp. App. 3.) The Justices' Court denied the State's motion to reconsider, specifically holding that the State

---

[5] That statute provides in relevant part:

> Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:
>
> . . . .
>
> If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

would be precluded from offering a curative instruction. (Pet. App. 4.)

The State then sought a writ of supervisory control from the Montana Supreme Court, arguing that the Montana statute at issue could be construed and applied in a constitutionally valid manner and that the State should be allowed to so instruct at the time of trial. (Resp. App. 4 and 5.) By order dated September 21, 1989, the Montana Supreme Court took supervisory control of the matter and reversed the order of the Justices' Court which found Mont. Code Ann. § 61-8-401(4)(c) 1989 unconstitutional. (Pet. App. 1.) Thereafter, petitioner filed this action seeking a writ of certiorari. Petitioner has not, to date, been tried, convicted, or sentenced in the Justices' Court for Missoula County on the misdemeanor charge at issue.

SUMMARY OF ARGUMENT

This Court should deny the petition for writ of certiorari because the decision of the Montana Supreme Court at issue is not a final decision within the meaning of 28 U.S.C.S. § 1257.

ARGUMENT

Petitioner attempts to invoke this Court's certiorari jurisdiction to review an interlocutory order of the Montana Supreme Court directed to a court of limited jurisdiction in a case in which petitioner has not been tried, convicted, or sentenced. Although the court of limited

jurisdiction involved is not a court of record, the current status of the case is evident from the order at issue. (Pet. App. 1 at 5.)

28 U.S.C.S. § 1257 provides in relevant part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Respondent would not deny that the order at issue here is from the highest court of our state or that it involves a state statute which is alleged to be repugnant to the Constitution of the United States. The order, however, is not a final judgment within the meaning of 28 U.S.C.S. § 1257.

This Court has long held that, in a criminal case, the final judgment for certiorari purposes is the sentence rendered following a conviction. *Bateman v. Arizona*, 429 U.S. 1302, 1306 (1976); *Parr v. United States*, 351 U.S. 513, 518 (1956); *Berman v. United States*, 302 U.S. 211, 212 (1937). Here, there has been no conviction or sentence. In addition, individuals convicted in a Montana justices' court have an absolute right to an appeal in our district

courts and such an appeal is a trial de novo.[6] If respondent were to be convicted in district court, he would then have an avenue of appeal to the Montana Supreme Court, our highest court.

In the present case, there is no "final judgment" for this Court to review. Petitioner has not been convicted or sentenced at even the initial trial court level. As the Montana Supreme Court pointed out in the order for which review is sought, "Because our ruling is for purposes of this case only, this issue may be raised in the event defendant is convicted and obtains a trial de novo in district court." (Pet. App. 1 at 5.)

---

[6] The right to a new trial in district court following a justices' court conviction is secured by Mont. Code Ann. § 46-17-311 (1989) which provides in relevant part:

> (1) Except as provided in 46-17-203, all cases on appeal from justices' or city courts must be tried anew in the district court and may be tried before a jury of six selected in the same manner as a trial jury in a civil action, except that the total number of jurors drawn shall be at least six plus the total number of peremptory challenges.
>
> (2) A party may appeal to the district court by giving written notice of his intention to appeal within 10 days after judgment, except that the state may only appeal in the cases provided for in 46-20-103.

Mont. Code Ann. § 46-17-203 (1989) refers to the entry of a guilty plea in a justices' court and forecloses the opportunity for an appeal of a conviction based upon such a plea.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MARC RACICOT
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*A. PETER FUNK
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215 North Sanders
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**Counsel of Record*

APPENDIX

APPENDIX INDEX

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Missoula, MT 59802
Telephone: (406) 721-1234

Attorney for Defendant

IN THE JUSTICE COURT OF MISSOULA COUNTY, STATE OF MONTANA

BEFORE DAVID K. CLARK, JUSTICE OF THE PEACE

STATE OF MONTANA, Plaintiff, -vs- LESTER TOLLEFSON, Defendant.	)	Cause No. 57585 MOTION IN LIMINE

COMES NOW the Defendant, Lester Tollefson, by and through his attorney, Noel K. Larrivee, and hereby moves this court to declare M.C.A. Section 61-8-401(4)(c) unconstitutional. M.C.A. Section 61-8-401(4)(c) unconstitutionally (1) violates the defendant's presumption of innocence, and (2) creates a mandatory rebuttable presumption. This motion is based upon *Rolle v. State of Florida*, 13 F.L.W. 1030, May 6, 1988, and other authorities cited in the brief filed contemporaneously herewith.

DATED this 18th day of April, 1989.

LARRIVEE LAW OFFICES

/s/ Noel K. Larrivee
Noel K. Larrivee

Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of April, 1989, a true and correct copy of the foregoing Motion in Limine was mailed, postage prepaid to the Plaintiff's counsel at the following address:

Betty Wing
Deputy Missoula County Attorney
Missoula County Courthouse
Missoula, MT 59802

/s/ Shelley M. Johnson
Shelley M. Johnson

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Attorney for Defendant

IN THE JUSTICE COURT OF MISSOULA COUNTY, STATE OF MONTANA

BEFORE DAVID K. CLARK, JUSTICE OF THE PEACE

STATE OF MONTANA, Plaintiff, -vs- LESTER TOLLEFSON, Defendant.	)	Cause No. 57585 DEFENDANT'S BRIEF IN SUPPORT OF MOTION IN LIMINE

FACTUAL SUMMARY

On March 26, 1989, Les Tollefson, the Defendant, was arrested and charged with driving under the influence of alcohol in violation of M.C.A. Section 61-8-401. The pertinent parts of this statute provide:

> 61-8-401. **Persons under the influence of alcohol or drugs.** (1) It is unlawful and punishable as provided in 61-8-714 and 61-8-723 for any person who is under the influence of:
>
> (a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public;
>
> . . .

(3) "Under the influence" means that as a result of taking into the body alcohol . . . a person's ability to safely operate a motor vehicle has been diminished.

(4) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, *shall give rise to the following presumptions*:

. . .

(c) *If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.*

Jury trial has been set in this matter for May 1, 1989.

ISSUE

The issue presented for review is whether M.C.A. Section 61-8-401(4)(c) is unconstitutional on the grounds that it conflicts with the Defendant's presumption of innocence and is violative of the defendant's due process rights.

This matter is brought before the Court by way of a Motion *in limine*. Its purpose, in general, is the exclusion of prejudicial matter in advance of its mention in court by means of a judicial determination as to its admissibility.

Black's Law Dictionary defines *in limine* as follows: "On or at the threshold; at the very beginning; preliminarily." Black's Law Dictionary Revised, 896 (4th ed. 1968). The motion *in limine* is perhaps best defined in the cases; it is a practical, commonsense innovation and is appropriately a part of the working law. For example, the court in *Bituminous Casualty Corporation v. Martin* said, "The only purpose of the motion [*in limine*] and order was to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury." *Bituminous Casualty Corporation v. Martin*, 78 S.W.2d 206, 208 (Tex. 1972). Thus, this motion has as its object the exclusion of material which, by its mere mention, result in prejudice on the part of the jury. In this case, the State intends on introducing evidence of the Defendant's blood alcohol level (in excess of 0.10). Such evidence is irrelevant when the presumption is declared unconstitutional. The effect of the motion would be to limit *any* evidence pertaining to the blood alcohol level of the Defendant. For these reasons, the most appropriate method to decide such issue is a motion in limine. As most attorneys recognize, curative instructions and sustained objections to improper questions often merely call more attention to the offending evidence, thus emphasizing its prejudicial effect. *See* Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744, 754. The use of a motion to exclude any mention of such matters allows the trial to proceed with less chance of error.

In January, 1974, a Montana Supreme Court decision recognized and upheld the use of a motion *in limine*. *Kipp v. Wong*, which originated in Yellowstone County, was a negligence action against a tavern owner by a patron who

was injured when an unruly person also present in the tavern shot him, along with two others. *Kipp v. Wong*, ___ Mont. ___, 517 P.2d 897 (1974). The court granted a motion *in limine* excluding testimony of one witness, Smith, who had seen the assailant, Gardiner, in the alley near the bar earlier in the evening during a fight. The excluded testimony related to Smith hearing a shot in the alley after his return to the bar. The court, per Mr. Justice Daly, held:

> "We concur with the trial court's view that plaintiff failed to demonstrate the probative value or relevance of this offered evidence. We find that trial court acted reasonably and within its sound discretion in granting the pretrial motion to exclude, in examining witness Smith outside the presence of the jury, and in excluding portions of Smith's testimony relating to gunshot sounds." *Id.* at 901.

In March, 1974, the Montana supreme court again upheld the granting of a motion *in limine* in Wallin v. Kinyon Estate, in which a will was admitted to probate over the contention that the drawer of the will was practicing law without a license and had unduly influenced the testator. *Wallin v. Kinyon Estate*, ___ Mont ___, 519 P.2d, 31 St.Rptr. 256 (1974). Since the will complied with all statutory requirements, the motion *in limine* was granted excluding any mention of the qualifications of the public administratrix who drew the will. The Supreme Court held that the district court had properly granted the motion and a directed verdict admitting the will to probate, and even went so far as to find that the court had properly denied a continuance on the basis of

surprise, the motion having been filed the day before trial.

In approving the granting of the motion *in limine* in *Wallin*, Mr. Justice Haswell wrote for the court as follows:

> "Authority for the granting of a motion in limine rests in the inherant [sic] power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties. *People v. Jackson*, 95 Cal. Rptr. 919, 18 Cal. App. 3d 504. Rule 16(6), M.R.Civ. P., permits the court in its discretion to consider " . . . matters as may aid in the disposition of the action." . . .
>
> The decision of the district court in excluding questions at trial of the proponent's alleged practice of law was conducive to the prevention of irrelevant, immaterial and prejudicial evidence being heard by the jury." *Id.* at St.Rptr. 259-60.

It is anticipated that the State will not dispute the Defendant's right to make a motion *in limine*. The purpose of motions *in limine* are to prevent situations where the prejudice to the Defendant cannot be cured retroactively. As the Court well knows, trying to "undo" or cure the damage often only serves to highlight the damage done.

The goal of both the State and the Defendant is a fair trial. The relief sought, an Order in limine directing that M.C.A. Section 61-8-401(4)(c) is unconstitutional, is the only mechanism to protect the Defendant's rights and insure a fair trial. The alternative is to begin the trial, have the State offer evidence of the Defendant's blood alcohol level, and then be confronted with the issue of

admissibility of such evidence. This motion is brought to avoid the necessity of a mid-trial continuance or motion for mistrial.

ARGUMENT

I. SECTION 61-8-401(4)(c) IS UNCONSTITUTIONAL.

To sustain the charge of driving under the influence of alcohol, the State must prove that the Defendant:

1. was driving a motor vehicle
2. upon the ways of this state open to the public
3. within Missoula County
4. while under the influence of alcohol

"Under the influence" means that as a result of alcohol a person's ability to safely operate a motor vehicle has been diminished.

See M.C.A. Section 61-8-401.

Since the first three elements of this crime are easily proven, and generally undisputable, the fourth element "while under the influence of alcohol" is the linchpin of the State's case. Proving "under the influence" requires proof that a person's ability to safely operate a motor vehicle has been diminished. But, Section 61-8-401(4)(c) resolves that issue for the State as well.

M.C.A. Section 61-8-401(4)(c) provides that if the accused's blood alcohol concentration is 0.10 or more, "it shall be presumed that the person was under the influence of alcohol. Such a presumption is rebuttable."

M.C.A. Section 61-8-401(4)(c) is unconstitutional for several reasons.

A. SECTION 61-8-401(4)(c) VIOLATES THE DEFENDANT'S PRESUMPTION OF INNOCENCE.

Essentially, once it has been established that the Defendant's blood alcohol concentration is 0.10 or more, Section 61-8-401(4)(c) permits the jury to *assume* that the Defendant was under the influence of alcohol *without any further evidence.* This permits the trier of fact to prejudge a conclusion which the jury should reach of its own volition.

> "A presumption which would permit the Court to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, *this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime."* (Emphasis in original) *Sandstrom v. State of Montana,* 442 U.S. 510, 522, 99 S.Ct. 2450, 2458, (1979).

Section 61-8-401(4)(c) is thus unconstitutional because it violates the Defendant's presumption of innocence.

Similarly, this same issue was addressed in *City of Missoula v. Shea,* 202 Mont. 286, 661 P.2d 410 (1983). In *Shea,* supra, our State Supreme Court stated:

> "Rule 301(b)(2), Mont.R.Evid., states that a disputable presumption 'may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in

> accordance with the presumption.' Thus, the trier of fact is not free to accept or reject the presumption. The effect of the presumption is to violate constitutional due process requirements by shifting the burden of persuasion to defendant and contradicting the presumption of innocence. We therefore come to the conclusion that the prima facie presumption is unconstitutional and invalid."

Id. at 414.

B. SECTION 61-8-401 (4)(c) CREATES AN UNCONSTITUTIONAL MANDATORY REBUTTABLE PRESUMPTION.

The State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the Defendant. *Sandstrom*, 442 U.S. at 524, 99 S.Ct. at 2459. But, Section 61-8-401(4)(c) provides that is [sic] *shall be presumed* that the person was under the influence of alcohol if the BAC was 0.10 or more. Thus Section 61-8-401(4)(c) is an unconstitutional mandatory rebuttable presumption because it relieves "the state of its burden of proof of the essential element of impairment by instructing the Court not that it has a choice to determine whether the Defendant was impaired based upon the results of a mechanical test, but that it must accept as proven the essential fact of impairment if the test result shows a blood alcohol reading of 0.10% or more." *Role v. State of Florida*, 13 F.L.W. 1030, 1031 (4th Dist. Florida, April 27, 1988) (Case No. 87-2089). [Attached]

As the U.S. Supreme Court noted in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, (1985), "A mandatory rebuttable presumption does not remove the presumed

element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the Court that it must find the presumed element unless the Defendant persuades the court not to make such a finding . . . such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." 471 U.S. at 317, 105 S.Ct. 1972-73. *See also, Sandstrom v. State of Montana,* 442 U.S. 510, 523-524, 99 S.Ct. 2450, 2459 (1979); *County Court of Ulster County v. Allen,* 442 U.S. 140, 157, 99 S.Ct. 2213, 2225 (1979).

Thus M.C.A. Section 61-8-401(4)(c) creates an unconstitutional mandatory rebuttable presumption.

C. "THE PRESUMPTION IS REBUTTABLE" IS MISLEADING.

The State will certainly argue that Section 61-8-401(4)(c) provides that "Such presumption is rebuttable." However, "The very statement that the presumption 'may be rebutted' could have indicated to a reasonable juror that the Defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the presumption. Standing alone, the challenged language undeniably created an unconstitutional burden-shifting presumption with respect to the [presumption]." *Francis v. Franklin,* 471 U.S. 318, 105 S.Ct. 1973.

Further, Montana rule of Evidence 301(b)(2) provides that a presumption "may be overcome by a preponderance of evidence contrary to the presumption." Such a requirement shifts not only the burden of production, but also the ultimate burden of persuasion on the issue of driving under the influence. *See also Sandstrom v. State of Montana,* 442 U.S. at 518, 99 S.Ct. at 2456.

Clearly, the language "the presumption may be rebutted" does not remedy the constitutional defect in M.C.A. Section 61-8-401(4)(c).

CONCLUSIONS

M.C.A. Sections 61-8-401(4)(c), (1) violates the Defendant's presumption of innocence, and (2) creates an impermissible mandatory rebuttable presumption, and thus should be declared unconstitutional by this court.

For the foregoing reasons, it is respectfully requested that the Court issue an Order in limine finding M.C.A. Section 61-8-401(4)(c) unconstitutional and prohibiting the introduction of any evidence of the Defendant's blood alcohol level or argument by counsel regarding the same.

DATED this 18th day of April, 1989.

LARRIVEE LAW OFFICES

/s/ Noel K. Larrivee
Noel K. Larrivee

Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of April, 1989, a true and correct copy of the foregoing Defendant's Brief in Support of Motion in Limine was mailed, postage prepaid to the Plaintiff's counsel at the following address:

Betty Wing
Deputy Missoula County Attorney
Missoula County Courthouse
Missoula, MT 59802

/s/ Shelley M. Johnson
Shelley M. Johnson

Barbara C. Harris
Deputy County Attorney
ROBERT L. DESCHAMPS III
Missoula County Attorney
County Courthouse
Missoula, MT 59802
Telephone – 712-5700 ext. 246
Attorney for Missoula County

IN THE JUSTICE COURT OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF MISSOULA
BEFORE DAVID K. CLARK, JUSTICE OF THE PEACE

STATE OF MONTANA, Plaintiff, -vs- LESTER C. TOLLEFSON, Defendant.	Cause No. 57585 MOTION FOR RECONSIDERATION

COMES NOW the State of Montana, Plaintiff in the above-entitled case, and moves this Court for reconsideration of its order dated May 22, 1989.

On May 22, 1989, this Court held the presumption in Section 61-8-401(4)(c), MCA, unconstitutional. During the briefing and oral argument of the issues raised in the Defendant's motion in limine, alternative jury instructions were discussed generally. The State now requests that this Court reconsider its decision in light of the specific jury instruction now offered by the State.

All legislative acts are presumed constitutional. When interpretations of a statute may vary, a constitutional interpretation is favored over one that is not. *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d

948 (1985); *T & W Chevrolet v. Darvial*, 196 Mont. 287, 641 P.2d 1368 (1982).

In deciding whether the presumption in Section 61-8-401, MCA, is constitutional, this Court limited its consideration to Montana statutory law and case law from the United States and Montana Supreme Courts. It refused to allow any alternative jury instruction regarding the presumption, stating that there is no support for an alternative instruction. The support for allowing proper jury instructions comes from the rule of law that constitutionality is presumed and from the case law of various other jurisdictions faced with the issue at hand.

In *Barnes v. People*, 735 P.2d 869 (Colo. 1987), the Supreme Court of Colorado discussed at length a statutory presumption almost identical to Montana's. The court eventually held that the jury instructions given in the case were improper, but found that the statutory language created a permissive inference. The court's discussion included the following:

> In criminal cases, the use of presumptions raises serious concerns because these evidentiary devices potentially conflict with the basic principles that a defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt.
>
> . . .
>
> As a result, to avoid implicating these constitutional limitations, presumptions in criminal cases are ordinarily construed to raise only permissive inferences. (Citations omitted) Indeed, even where statutory language appears to create a mandatory presumption in criminal cases,

courts commonly read the statute as creating only a permissive inference.

. . .

> In this view, courts in other states reviewing presumptions contained in DUI statutes substantially similar to Colorado's have concluded that the language "shall be presumed" or its equivalent creates only a permissive inference that a defendant was under the influence. *See, e.g. Commonwealth v. Moreira,* 385 Mass. 792, 434 N.E.2d 196 (1982) ("shall be a presumption"); *State v. Dacey,* 138 Vt. 491, 418 A.2d 856 (1980). *See also State v. Hanson,* 203 N.W.2d 216 (Iowa 1972) ("shall be admitted as presumptive evidence"); *State v. Bailey,* 184 Kan. 704, 339 P.2d 45 (1959); *State v. Cooke,* 270 N.C. 644, 155 S.E.2d 165 (1967); *Commonwealth v. Ditrancesco,* 458 P.2d 188, 329 A.2d 204 (1974). In light of this background, we believe that Section 42-4-1202 is properly construed to authorize only a permissive inference that a defendant was under the influence of alcohol. (Footnotes omitted.)

735 P.2d at 872-73. The court then reviewed the jury instructions that had been given. The case was remanded because the jury instructions conflicted, but the decision left no doubt that the jury could have been instructed regarding the presumption.

The result was the same in *State v. Dacey,* 418 A.2d 856 (Vt. 1980), where the Supreme Court of Vermont struck down misleading jury instructions, but upheld the statutory presumption:

> We therefore hold that § 1204(a)(3) creates a permissive inference, shift no burden to the defendant, and permits but does not compel a jury finding that defendant was under the influence of intoxicating liquor while operating a motor

> vehicle upon proof of .10% or more blood-alcohol content by weight at the time of operation. (Citations omitted.) (Emphasis in original.)

418 A.2d at 859. *See also, State v. Coates,* 563 P.2d 208 (Wash.App. 1977); *Commonwealth v. DiFrancesco,* 329 A.2d 204 (Pa. 1974).

The Supreme Court of Kansas considered the issue at hand in *State v. Price,* 664 P.2d 869, 872 (Kan. 1983). It stated: "The jury instructions will generally be controlling in deciding whether a presumption is conclusive or permissive in a case, although their interpretation may require recourse to the statute involved and cases decided under that statute." The court went on to rule that the jury instructions given, including one that used the words "you shall presume", were proper. 664 P.2d at 873.

The proper procedure in a case such as this is to allow the parties to offer jury instructions regarding the presumption and its application to the facts. As shown in cases discussed above, the *application* of the presumption is critical to any violation of a defendant's rights. The Montana Supreme Court has held that a defendant must show the invalidity of a presumption as it is applied to him or there is no prejudice. *Parker v. Crist,* ___ Mont. ___, 621 P.2d 484 (1980); *State v. Sunday,* 187 Mont. 292, 609 P.2d 1188 (1980). Even where a statute has been declared unconstitutional, the Montana Supreme Court has allowed substitution of proper jury instructions to protect a defendant's rights. *State v. Kramp,* 200 Mont. 383, 651 P.2d 614 (1982).

Based on the case law set out above, the State asserts that the following jury instruction should be allowed as a proper statement of law:

> You are instructed that if the defendant has an alcohol concentration in his blood, breath or urine of 0.10 or more, you are permitted, but not required to infer that he was under the influence of alcohol. It is your exclusive province to determine whether the facts and circumstances shown by the evidence warrant the inference to be drawn by you. You must weigh the evidence presented and decide whether the State has proven beyond a reasonable doubt that the defendant was under the influence of alcohol.

This proposed instruction includes language similar to the presumption instruction approved by the Montana Supreme Court in the *Kramp* case. *Kramp*, 200 Mont. at 397, 651 P.2d at 621-22.

CONCLUSION

The State respectfully requests that this Court reconsider its decision and allow the proposed instruction.

DATED this 23rd day of June, 1989.

/s/ Barbara C. Harris
Barbara C. Harris
Deputy County Attorney

CERTIFICATE OF MAILING

I, Barbara C. Harris, do hereby certify that on the 23rd day of June, 1989, I mailed a true and correct copy of the foregoing Motion for Reconsideration, with postage prepaid and addressed to Noel Larrivee, 334 E. Broadway, Missoula, MT 59802.

DATED this 23rd day of June, 1989.

/s/ Barbara C. Harris

IN THE SUPREME COURT OF
THE STATE OF MONTANA

STATE OF MONTANA,

Plaintiff and Petitioner,

-vs-

LESTER C. TOLLEFSON,

Defendant and Respondent.

APPLICATION FOR WRIT OF SUPERVISORY CONTROL

COMES NOW the State of Montana and alleges as follows:

1. On March 26, 1989, the Defendant, Lester C. Tollefson, was charged with Driving Under the Influence of Alcohol, in violation of Section 61-8-401, MCA (Missoula County Ticket No. C04A057585). Following his arrest, Tollefson submitted to a blood alcohol test. Laboratory analysis of the blood showed a blood alcohol concentration of 0.18.

2. On April 18, 1989, the Defendant filed a pretrial motion in limine alleging that the presumption found in Section 61-8-401(4)(c), MCA, is unconstitutional. The Defendant further contended that evidence of his blood alcohol concentration should not be allowed at trial. (See Motion and Brief, attached hereto as Exhibit A.)

3. The issues raised in the Defendant's motion in limine were briefed by both parties (See State's Brief, attached hereto as Exhibit B) and oral argument was

heard by the Justice of the Peace on May 8, 1989. The issues include whether the presumption in Section 61-8-401(4)(c), MCA, is a mandatory or permission presumption and whether it violates a defendant's right to be presumed innocent. The procedural issue of whether the above issues should be decided prior to presentation of jury instructions was raised by the State.

4. On May 22, 1989, Missoula County Justice of the Peace David K. Clark ruled that the presumption regarding a blood alcohol concentration of 0.10 or greater is unconstitutional. Judge Clark further ruled that the State would be precluded from presenting any jury instructions referring to the presumption. (See Order dated 5-22-89, attached hereto as Exhibit C.)

5. On June 23, 1989, the State filed a Motion for Reconsideration, attached hereto as Exhibit D. The Motion included a proposed jury instruction regarding the evidence of blood alcohol concentration. The Motion was denied in an order dated July 13, 1989, and the Justice's Court again ruled that the presumption of Section 61-8-401(4)(c), MCA, is mandatory. (See Exhibit D, attached hereto.)

6. The requested writ is the State's only possible remedy. The Orders of the Justice of the Peace are not appealable pursuant to Section 46-20-103, MCA. If the State were required to wait until trial of this case, an acquittal would preclude further action by the State, as would a conviction. Therefore, the State of Montana has no remedy to obtain review of the orders other than a writ of supervisory control

7. Because the orders preclude the State from applying a statutory presumption in this case and others, and are otherwise not reviewable, this remedial writ is necessary to the administration of justice. Rule 17(a), Mont.R.App.Proc.

WHEREFORE, the Petitioner respectfully requests that this Court accept jurisdiction of this matter pursuant to Rule 17, Montana Rules of Appellate Procedure, stay the matter pending its determination, and issue a writ of supervisory control.

DATED this 7th day of August, 1989.

ROBERT L. DESCHAMPS III
Missoula County Attorney

/s/ Barbara C. Harris
Barbara C. Harris
Deputy County Attorney

CERTIFICATE OF MAILING

I, Barbara C. Harris, do hereby certify that on the 7th day of August, 1989, I mailed a true and correct copy of the foregoing Application for Writ of Supervisory Control, with postage prepaid and addressed to the following:

Noel Larrivee
334 E. Broadway
Missoula, MT 59802

Paul Johnson
Assistant Attorney General
3rd Floor, Justice Building
215 N. Sanders
Helena, MT 59620

DATED this 7th day of August, 1989.

/s/ Barbara Harris

IN THE SUPREME COURT OF
THE STATE OF MONTANA

STATE OF MONTANA,

Plaintiff and Petitioner,

-vs-

LESTER C. TOLLEFSON,

Defendant and Respondent.

MEMORANDUM IN SUPPORT OF APPLICATION FOR WRIT OF SUPERVISORY CONTROL

INTRODUCTION

Following his arrest for Driving Under the Influence of Alcohol (DUI), the Defendant, Lester Tollefson, submitted to a blood test that showed a blood alcohol concentration of 0.18. Prior to trial, he filed a motion and brief arguing that the statutory presumption applicable to his blood alcohol level is unconstitutional. The Justice's Court agreed with the Defendant and ruled that the presumption is unavailable to the State.

ARGUMENT

I. THE CIRCUMSTANCES OF THIS CASE REQUIRE THAT THIS COURT TAKE JURISDICTION.

The Justice's Court in this case has ruled that the presumption in Section 61-8-401(4)(c), MCA, is unconstitutional and that the State may not rely on it to prove

its case. The result of this ruling is not one listed in Section 46-20-103, MCA. Because the State may not appeal the ruling, it has no remedy other than an extraordinary writ from this Court. Such a writ is justified when there is no direct appeal or other remedial procedure available to provide relief and when extraordinary and compelling circumstances are present. Rule 17, Mont.R.App.C.Proc.; *State v. District Court*, 38 St.Rptr. 1204, 632 P.2d 318, 322 (1981). The extraordinary and compelling circumstance of this case is that the State is unable to otherwise obtain review of the justice's court decision that the statute is unconstitutional. Justice requires that this ruling, which results in the the [sic] loss of the use of the statutory presumption in this and numerous other cases, be reviewed.

II. THE PRESUMPTION IN SECTION 61-8-401(4)(C), MCA, IS CONSTITUTIONAL AND CAN BE CONSTITUTIONALLY APPLIED.

The presumption at issue here is set out in Section 61-8-401(4)(c), MCA, as follows:

> Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substances, shall give rise to the following presumptions:
>
> . . .

> (c) If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

All legislative acts are presumed constitutional. When interpretations of a statute may vary, a constitutional interpretation is favored over one that is not. *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985); *T & W Chevrolet v. Darvial*, 196 Mont. 287, 641 P.2d 1368 (1982). The Court of Appeals of Washington reviewed the same statutory presumption in *State v. Coates*, 563 P.2d 208 (Wash. App. 1977). In finding the presumption constitutional, the court stated:

> We conclude that the presumed fact of driving under the influence of intoxicating liquor follows beyond a reasonable doubt from the proven fact of a .10 percent blood-alcohol concentration, and R.C.W. 46.-61.506(2)(c) does not relieve the State of its burden of proof.

563 P.2d at 210.

In this case, the Justice's Court improperly chose an unconstitutional reading of the statute over a constitutional reading. In doing so, the court rejected the rulings of various other state courts.

In *Barnes v. People*, 735 P.2d 869 (Colo. 1987), the Supreme Court of Colorado discussed at length a statutory presumption almost identical to Montana's. The court eventually held that the jury instructions given in the case were improper, but found that the statutory language created a permissive inference. The court's discussion included the following:

In criminal cases, the use of presumptions raises serious concerns because these evidentiary devices potentially conflict with the basic principles that a defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt.

. . .

As a result, to avoid implicating these constitutional limitations, presumptions in criminal cases are ordinarily construed to raise only permissive inferences. (Citations omitted) Indeed, even where statutory language appears to create a mandatory presumption in criminal cases, courts commonly read the statute as creating only a permissive inference.

. . .

In this view, courts in other states reviewing presumptions contained in DUI statutes substantially similar to Colorado's have concluded that the language "shall be presumed" or its equivalent creates only a permissive inference that a defendant was under the influence. *See, e.g. Commonwealth v. Moreira,* 385 Mass. 792, 434 N.E.2d 196 (1982) ("shall be a presumption"); *State v. Dacey,* 138 Vt. 491, 418 A.2d 856 (1980). *See also State v. Hanson,* 203 N.W.2d 216 (Iowa 1972) ("shall be admitted as presumptive evidence"); *State v. Bailey,* 184 Kan. 704, 339 P.2d 45 (1959); *State v. Cooke,* 270 N.C. 644, 155 S.E.2d 165 (1967); *Commonwealth v. Ditrancesco,* 458 P.2d 188, 329 A.2d 204 (1974). In light of this background, we believe that Section 42-4-1202 is properly construed to authorize only a permissive inference that a defendant was under the influence of alcohol. (Footnotes omitted.)

735 P.2d at 872-73.

The result was the same in *State v. Dacey*, 418 A.2d 856 (Vt. 1980), where the Supreme Court of Vermont struck down misleading jury instructions, but upheld the statutory presumption:

> We therefore hold that § 1204(a)(3) creates a permissive inference, shift no burden to the defendant, and *permits but does not compel* a jury finding that defendant was under the influence of intoxicating liquor while operating a motor vehicle upon proof of .10% or more blood-alcohol content by weight at the time of operation. (Citations omitted.) (Emphasis in original.)

418 A.2d at 859. *See also, State v. Coates*, 563 P.2d 208 (Wash.App. 1977); *Commonwealth v. DiFrancesco*, 329 A.2d 204 (Pa. 1974).

The Supreme Court of Kansas considered the issue at hand in *State v. Price*, 664 P.2d 869, 872 (Kan. 1983). It stated: "The jury instructions will generally be controlling in deciding whether a presumption is conclusive or permissive in a case, although their interpretation may require recourse to the statute involved and cases decided under that statute." The court went on to rule that the jury instructions given, including one that used the words "you shall presume", were proper. 664 P.2d at 873.

The Court in this case disregarded the decisions in *Coates, Dacey, DiFrancesco*, and *Price*, and specifically disagreed with the decision in *Barnes*. Finding no ambiguity in the statutory language, the Court ruled that it is unconstitutional on its face. The Court's rulings preclude any instruction regarding the statutory presumption.

CONCLUSION

The Justice's Court in this case has ruled that Subsection 61-8-401(4)(c), MCA, is unconstitutional. For the proper administration of justice, this Court must take jurisdiction and review these otherwise unappealable orders. The Justice Court's ruling is contrary to case law from this State and others and must be reviewed.

DATED this 7th day of August, 1989.

ROBERT L. DESCHAMPS III
Missoula County Attorney

/s/ Barbara C. Harris
Barbara C. Harris
Deputy County Attorney

CERTIFICATE OF MAILING

I, Barbara C. Harris, do hereby certify that on the 7th day of August, 1989, I mailed a true and correct copy of the foregoing Memorandum in Support of Application for Writ of Supervisory Control, with postage prepaid and addressed to the following:

Noel Larrivee
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Helena, MT 59620

DATED this 7th day of August, 1989.

/s/ Barbara C. Harris